

HUMAN SERVICES BOARD

In re) Fair Hearing No. J-11/08-501
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 Appeal of)

The petitioner appeals the decision by the Department for Children and Families, Family Services Division substantiating a report of sexual abuse by the petitioner of a child. The preliminary issue is whether the petitioner's appeal is timely.

On March 16, 2007, the Department sent the petitioner a notice that it had substantiated a report that the petitioner had sexually abused a child identified by name, but herein referred to as S.S. The record shows that the petitioner requested a commissioner's review of that decision, and that in a notice dated August 28, 2007, the Department upheld its substantiation of sexual abuse by the petitioner of that child. The notice included an explanation of the petitioner's right to appeal that decision to the Human Services Board. In keeping with the statute that was in

effect at that time (see *infra*), there was no time limit given for an appeal to the Board.

The petitioner does not dispute that by a notice dated December 31, 2007 the Department informed him that an allegation of sexual abuse by the petitioner of another child, identified as Z.D., had been substantiated, and that the petitioner had until January 17, 2008 to appeal that substantiation. The notice included the following warning: "If you do not indicate your wish to appeal by this date, your name will be entered into the Child Abuse and Neglect Registry". A pamphlet further explaining the registry and appeal rights was enclosed with the notice.

On November 4, 2008, the Board received a request for appeal by the petitioner. A telephone status conference was held on December 9, 2008, at which time the matter was continued to determine whether criminal charges were being brought against the petitioner. At a status conference held on January 12, 2009 the Department reported that it had determined that there were no related criminal charges pending against the petitioner, and that it wished to go forward with the hearing if it could make the alleged victim available as a witness. A date for hearing was set on February 19, 2009. It was not made clear by either party

during these status conferences that the Department considered the petitioner's appeal to concern only S.S.

On January 21, 2009 the Department informed the petitioner and the Board that it was removing the petitioner's name from the registry. Again, it was not clear that the Department was referring only to the case involving S.S.

On January 26, 2009 the Board sent a letter to the petitioner asking him if he considered his appeal "settled". In a phone call to the Board on February 3, 2009 the petitioner indicated that he would withdraw his appeal regarding S.S., but that he "wasn't sure" if he wanted to pursue an appeal regarding Z.D. The Board set the matter for another telephone status conference on March 10, 2009. Subsequent correspondence from the parties indicated that the petitioner wanted to appeal the case involving Z.D., but that the Department considered his appeal of that matter to be untimely.

At the status conference on March 10, 2009 the petitioner admitted that he had not filed any appeal, in either case, until November 4, 2008, but he alleged that he had been "confused".

The jurisdiction of the Human Services Board to consider appeals regarding the Department's substantiation of reports of child abuse and neglect is statutory. Prior to September 1, 2007 the statutes provided that a person could appeal a substantiation "at any time". 33 V.S.A § 4916(h) (repealed). However, under 33 V.S.A. § 4916a(c), which became effective September 1, 2007:

A person alleged to have abused or neglected a child may seek an administrative review of the department's intention to place the person's name on the registry by notifying the department within 14 days of the date the department mailed notice of the right to review. . . The commissioner may grant an extension past the 14-day period for good cause, not to exceed 28 days after the department has mailed notice of the right to review."

Under 33 V.S.A § 4916b(a), which also became effective on September 1, 2007, an individual then has thirty days in which to appeal the Department's administrative review decision to the Human Services Board.

33 V.S.A. § 4916a(j) (also effective on September 1, 2007) provides:

Persons whose names were placed in the registry on or after January 1, 1992 but prior to September 1, 2007 shall be entitled to an opportunity to seek an administrative review to challenge the substantiation.

As noted above, the petitioner's only appeal in either child's case was not filed with the Board until November 4,

2008. This was more than fourteen months after the Department's administrative review decision in the case involving S.S., and more than ten month's after the notice of substantiation the Department sent to him in the case involving Z.D. However, inasmuch as the Department's decision in the S.S. case placing the petitioner's name in the registry had been made prior to September 1, 2007, the Department granted the petitioner another administrative review in that case, and ultimately decided to remove the petitioner's name from the registry.

But inasmuch as its decision and notice in the Z.D. case was made after September 1, 2007, the Department maintains that the petitioner's appeal in that matter was not timely.

It must be concluded that the notice the Department sent the petitioner in the Z.D. case was clear and unequivocal not only in communicating the Department's decision substantiating sexual abuse and identifying Z.D. as the child in question, but also accurately and thoroughly explaining the petitioner's appeal rights. Inasmuch as the petitioner took no action whatsoever on either case for almost a year after receiving that notice, he cannot now reasonably claim to have been confused. There is no question that the petitioner's appeal in the Z.D. case was grossly out of the

statutory time limit. Therefore, the Board does not have jurisdiction to consider it.

ORDER

The petitioner's appeal is dismissed as untimely.

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